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SUPREME COURT, U.S.
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No. 87-1405

In The
Supreme Court of the United States
October Term, 1987

JUAN GONZALES, JR.,

Petitioner,

v.

RUDY LEAL, JR.; MARC GALLARDO; and THE CITY OF SAN ANTONIO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth U.S. Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Under 42 U.S.C. § 1983, what standard of conduct is applied to an arresting officer to determine whether the arrestee has suffered a violation of his constitutional rights.

LIST OF PARTIES

1. JUAN GONZALES, JR., Petitioner
2. RUDY LEAL, JR., Respondent
3. MARC GALLARDO, Respondent
4. THE CITY OF SAN ANTONIO, TEXAS, Respondent

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, Rudy Leal, Jr. and Marc Gallardo, respectfully submit their Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth U.S. Circuit.

CITATION TO OPINIONS BELOW

Petitioner accurately states the status of the opinions below in his Petition for Writ of Certiorari.

JURISDICTION

Petitioner accurately states his allegation of jurisdiction in his Petition for Writ of Certiorari.

STATUTE INVOLVED

42 U.S.C. § 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
>
> R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

STATEMENT OF THE CASE

1. Petitioner is substantially accurate in his recitation of the Course of Proceedings in his Petition for Writ of Certiorari.

2. Petitioner's recitation in the Facts Material to the Question Presented is selective and does not present a fair version of the testimony of the witnesses. Respondents will limit their response to some necessary additions and clarifications.

The Petitioner's testimony adduced at trial was not uncontroverted. There exists a wide disparity with respect to who used force, when and how much. There was testimony that at the precise point in the arrest procedure that the altercation made the basis of Petitioner's claim occurred, Peitioner was not handcuffed. There is testimony that Officer Leal had made a decision to arrest Petitioner and had fastened a handcuff to Petitioner's left wrist. At that point, Petitioner began to resist the arrest whereupon Officer Leal, engaging in proper police procedure, attempted to position Petitioner between himself and a solid object so as to gain the advantage of leverage and complete his handcuffing of the Petitioner.

The testimony of the seven (7) other witnesses referred to in Petitioner's Petition for Writ of Certiorari at Page 3 notwithstanding, Petitioner himself admitted, under examination by the court, that only one handcuff had been placed on him at the time he was pushed up against the car. (App. at 1).

SUMMARY OF ARGUMENT

1. There is no conflict in decisions on the standard applicable to violations under section 1983. Nine of the twelve federal circuits that have spoken to the issue use the same or a substantially similar analysis.

2. The analysis currently utilized by a majority of the circuits in analyzing violations of section 1983 comports with the principles announced in *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Baker v. McCollan*, 443 U.S. 137 (1979).

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ARGUMENT

I.

THERE IS NO CONFLICT IN DECISIONS ON THE STANDARD APPLICABLE TO VIOLATIONS UNDER 42 U.S.C. §1983.

As this court recognized in *Baker v. McCollan*, 443 U.S. 137 (1979), violations of the duty of care arising out of tort law are not actionable under section 1983. A mere battery, without more, does not become a constitutional violation merely because Respondents herein were police officers in the exercise of their duties and ostensibly acting under color of state law. *See Mills v. Smith*, 656 F.2d 337, 340 n.2 (8th Cir. 1981); *see also Parratt*, 451 U.S. at 544; *Baker*, 443 U.S. at 146. Petitioner's proper remedy, if any exists, is under the laws of the state of Texas and the tort principals embodied therein. Having never before complained about the *Shillingford* standard, *see Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), and only

after failing to prevail in both the trial court and the court of appeals, Petitioner now complains that the standard utilized in this case is too "onerous." (Petition for Writ of Certiorari at 2). Respondents will here detail their contention that the disparity in the circuits perceived by Petitioner does not in fact exist and that the majority of the circuits that have decided this question are in general agreement with regard to the amount of force necessary to trigger the protections of 42 U.S.C. § 1983.

Petitioner is incorrect in his assertion with respect to the Court of Appeals' opinion in *McKenzie v. Lamb,* 738 F.2d 1005 (9th Cir. 1984). While it is true no physical harm was inflicted on Plaintiffs in that case, the court of appeals' reversal seems to have turned on whether there were any material facts in dispute with respect to the question of probable cause to arrest the Plaintiffs and whether summary judgment was proper. The court was charged with the task of determining whether probable cause to arrest the Plaintiffs existed as a matter of law. *Id.* at 1007. According to the court's opinion, in a section 1983 action:

> the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, *see Smiddy v. Varney,* 665 F.2d 261, 265 (9th Cir. 1981), *cert. denied,* 459 U.S. 829, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982); *Gilker* [v. Baker], 576 F.2d [245] at 247 [(9th Cir. 1978)]; and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest.

Id. at 1008.

The court concluded that appellants had presented sufficient evidence to make out a claim for "excessive

use of force." After detailing the evidence and construing same in the light most favorable to the party opposing the summary judgment, as the court was required to do pursuant to this Court's opinion in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), the court reversed the district court's grant of summary judgment on the issue of use of excessive force. *McKenzie*, 738 F.2d at 1011. The effect of this conclusion was merely that movants in the district court had failed to carry their burden of persuasion. Most importantly, the court of appeals stated "the reasonableness of force should be analyzed in light of such factors as the requirements for the officers' safety, the motivation for the arrest, and the extent of the injury inflicted. *Roberts v. Marino*, 656 F.2d 1112, 1114 (5th Cir. 1981)." *Id.* at 1011.

The Ninth Circuit made specific reference to the *Roberts* opinion which was, in turn, based upon *Shillingford*. *Roberts*, 656 F.2d at 1114. Therefore, the standard to be used in determining whether the force used to effectuate an arrest was reasonable is similar in the Fifth and Ninth Circuits.

Petitioner's reliance on the Second Circuit's opinion in *Bellows v. Dainack*, 555 F.2d 1105 (2d Cir. 1977), is equally misplaced. That case involved two police officers appealing an adverse judgment entered in favor of an arrestee in the district court. The court of appeals reversed and remanded the judgment against the police officers for the reason that counsel for p' intiff engaged in improper jury argument which "seriously prejudiced the defendants' right to a fair trial." *Id.* at 1108. The court's opinion cannot fairly be stated to hold that the

plaintiff's constitutional rights had been violated affording him relief under 42 U.S.C. § 1983. In a footnote, the court recognized that local law enforcement officers who act under color of state law and who use excessive force in enforcing state laws are subject to civil liability under section 1983 when their actions deprive persons of rights guaranteed by the Constitution and laws of the United States. *See id.* at 1106 n.1. The court did not analyze the force used and did not determine that it was either excessive or not excessive. Neither did the opinion reveal any standard of review with regard to determining whether force used in effectuating an arrest is so excessive as to constitute a violation of an arrestee's constitutionally protected rights. Such a determination was unnecessary in view of the reversal and remand of the judgment against the police officers on the basis of improper jury argument.

In fact, the analysis stated in *Shillingford* has its genesis in the Second Circuit opinion of *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson,* 414 U.S. 1033 (1973), which was decided by the Second Circuit some four years prior to its opinion in *Bellows.* The portion of the *Shillingford* opinion attacked by Petitioner in the instant case is based upon Judge Friendly's opinion in *Johnson. See Shillingford,* 634 F.2d at 265. Therefore, Respondents respectfully submit that the Court of Appeals' opinion in *Bellows v. Dainack* does not support Petitioner's contention that there are "varying standards resulting in an inequitable application of 42 U.S.C. 1983." (Petition for Writ of Certiorari at 4).

Similarly, the Eighth Circuit Court of Appeals' opinion in *Patzner v. Burkett,* 779 F.2d 1363 (8th Cir. 1985), is of no help to Petitioner in his attempt to establish the

lack of a uniform standard among the circuits. In deciding whether the officers' use of force to arrest plaintiff was reasonable, the court noted that the matter was before them on an appeal from a summary judgment and that their holding reversing the district court's conclusion that the degree of force used in arresting the plaintiff was reasonable as a matter of law was "limited to the recognition that the alleged use of excessive force is generally an issue of fact." *Id.* at 1371.

In stating the factors relevant to a determination of whether the use of force was reasonable and properly motivated, the court quoted *Putnam v. Gerloff*, 639 F.2d 415, 420 (8th Cir. 1981) and *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033, 94 S.Ct. 462 (1973).

The language of *Putnam* and *Johnson* relied upon by the Eighth Circuit is as follows:

> [A] court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1371.

It is abundantly clear that the factors used by the Second and Eighth Circuits are similar if not the same as the factors enumerated in *Shillingford*. *See* 634 F.2d at 265. The cases relied upon by Petitioner reveal that the extent of injuries suffered by the arrestee and whether the officer inflicted those injuries maliciously are factors used in those circuits.

Respondents respectfully submit Petitioner's allegation that *Shillingford* requires a showing of "severe injuries" inflicted on an arrestee as a prerequisite to a finding of a constitutional violation is incorrect. (Petition for Writ of Certiorari at 4). The *Shillingford* opinion sets out the factors to be considered in determining whether physical abuse meted out by a police officer is actionable under section 1983. Immediately following these factors, the court gave an example that should an officer's action cause severe injuries, be grossly disproportionate to the need for action under the circumstances and be inspired by malice rather than mere careless or unwise excessive zeal so that it amounts to an abuse of official power that shocks the conscious, then it should be redressed under section 1983. *Id.* at 265.

In *Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986), the court was reviewing a defendant officer's allegation that the district court improperly denied his motion for directed verdict, motion for judgment notwithstanding the verdict and motion for a new trial. The court reviewed the facts pursuant to its opinion in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc) to determine whether the defendant was entitled to relief. Apparently, the *Hinshaw* court concluded, after reviewing the facts under the *Boeing* standard, that the officer was liable to plaintiff under section 1983 as a matter of law. The court found that the plaintiff suffered severe injury, that the officer engaged in action grossly disproportionate to the need for such action and, finally, that the officer's action was inspired by malice. The court, therefore, concluded that the district court properly denied the officer's

motion for directed verdict, for judgment notwithstanding the verdict, and for new trial. *Id.* at 1267-68.

Finally, in *Hinojosa v. City of Terrell*, 834 F.2d 1223 (5th Cir. 1988), the Fifth Circuit once again had the opportunity to review an excessive use of force claim. In that case, a pool hall operator brought an action against, among others, a police officer alleging civil rights violations and several pendant state law claims arising from his arrest. The district court's judgment was based upon a jury verdict finding, *inter alia*, that the police officer used excessive force against Hinojosa during the arrest. *Id.* at 1224. As in the instant case, Hinojosa did not complain either in the district court or on appeal to the use of the *Shillingford* standard. The court stated that *Shillingford* was developed in recognition of the need to distinguish potential constitutional violations from mere breaches of state law pursuant to this Court's opinion in *Baker*. The Fifth Circuit concluded that "*Shillingford* limits redress under section 1983 to police conduct that (1) caused at least meaningful injury, (2) was grossly disproportionate to the need presented, and (3) was motivated by malice." *Id.* at 1229. In the *Hinojosa* case, the plaintiff suffered no injury but claimed that the excessive use of force was evidenced by the police officer pointing a gun at him.

The Fifth Circuit ultimately reversed the judgment entered by the district court on the excessive use of force claim. The court recognized that plaintiff, Hinojosa, suffered no other injury other than "the understandable immediate emotional distress . . . at being the target of the gun point." *Id.* at 1230. The court went on to state, how-

ever, that it was not determining whether some type of physical injury would in every instance be necessary for section 1983 liability on a claim of excessive use of force and cited the opinions in *Gumz v. Morrissette,* 772 F.2d 1395, 1400-02 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986), and *Black v. Stephens,* 662 F.2d 181, 189 (3d Cir. 1981). *See Hinojosa,* 834 F.2d at 1230.

Due to the complexity presented by these types of claims and the various fact situations in which they are formed, Respondents respectfully submit that no "bright line" rule can be formulated to determine whether excessive force has been used in effectuating an arrest. *See Shillingford,* 634 F.2d at 265. Petitioner asks this Court to determine whether malice must be proved in order to prevail on a 1983 action alleging excessive use of force. (Petition for Writ of Certiorari at 5). Respondents respectfully submit that the malice requirement is an important one in determining whether the actions of an officer acting under color of law transcend the bounds of tort liability and amount to a violation of a constitutionally protected right triggering the protections of section 1983.

II.

IMPORTANT QUESTION OF FEDERAL LAW

Petitioner cites this Honorable Court's opinions in *Baker v. McCollan* and *Parratt v. Taylor* and states that since that time, the circuits have been free to formulate their own standard of review and that the circuits are not uniform in their review of 1983 claims. Petitioner asks this Court to determine a uniform standard to be followed

by all circuits in determining what level of force is excessive and, therefore, violative of an arrestee's constitutional rights.

Respondents respectfully submit that the standard promulgated by the Fifth Circuit in *Shillingford* is substantially similar to the analysis utilized by Judge Friendly in the Second Circuit's opinion of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973). In that case, the court stated:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1033.

The portion of the *Shillingford* opinion that contains the three-pronged analysis attacked by Petitioner cites to *Johnson* and the Fourth Circuit's opinion in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). In that case, the Fourth Circuit adopted the analysis first used in *Johnson* and applied it in analyzing whether a student's constitutionally protected rights had been violated in the course of receiving corporal punishment. *Id.* at 613. The Fourth Circuit recently adopted this analysis in reviewing excessive use of force claims against police officers. *See Justice v. Dennis*, 834 F.2d 380, 383 (4th Cir. 1987). Recently, the same standard has been adopted by several of the circuits. *See, e.g., H.C. by Hewett v. Garrard*, 786

F.2d 1080, 1085 (11th Cir. 1986) (*Shillingford* analysis used to determine whether juvenile detention center detainee's constitutional rights violated by superintendent of detention center); *Lewis v. Downs*, 774 F.2d 711, 713 (6th Cir. 1985) (*Johnson* analysis used to determine whether arrestee's constitutionally protected rights violated by police officer effecting arrest); *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985) (*Shillingford* analysis utilized to determine whether warden violated rights of farmer in manner in which arrest warrant executed); *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985) (jury instruction in 1983 action based upon *Shillingford* upheld); *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir.), *cert. denied*, 474 U.S. 844 (1985) (*Shillingford* standard used to determine whether death of plaintiff's decedent due to excessive force on part of police officers); *Wise v. Bravo*, 666 F.2d 1328, 1333-34 (10th Cir. 1981) (*Shillingford* utilized to determine whether plaintiff's constitutionally protected rights violated by police officers).

The Third Circuit uses a similar type of analysis. In *Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981), the court stated that for a common law tort committed by a police officer to rise to the level of a constitutional harm actionable under section 1983, one must determine whether the police officer's conduct "shocks the conscience." The court also stated that the due process clause in the eighth amendment extends to protection from an official's abusive exercise of his powers to inflict grossly undue harm. *Id.* While not precisely tracking the language in *Johnson* or *Shillingford* or the later opinions adopting the majority

view, the successful plaintiff must nevertheless establish conduct on the part of a police officer evidencing injuries sufficient to shock the conscience. The standard of review used by the Third Circuit is substantially similar to that used in the circuits detailed above. The requirement of substantial harm so as to shock the conscience is necessary so as to avoid the use of the United States Constitution as a theory of recovery in tort cases. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981); *Paul v. Davis*, 424 U.S. 693, 701 (1976).

The complexity of the issues presented in an excessive use of force claim seeking redress under section 1983 coupled with the almost innumerable fact patterns in which they may arise does not permit the formulation of a single generic standard to be used in analyzing such claims. *See Baker v. McCollan*, 443 U.S. 137, 139-40 (1979). The perceived disparity in the standards utilized in the circuits that have decided these questions, upon close examination, does not exist. Nine of the twelve federal circuits use an analysis that is, for the most part, the same. Therefore, the circuits, to this point in time, are uniform in their review of excessive use of force claims under section 1983.

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CONCLUSION

The decision of the Fifth Circuit in this case and its use of the three-pronged analysis found in its opinion in *Shillingford* is correct. The three-pronged test, while onerous from the standpoint of establishing tort liability, insures that only those actions by police officers amounting to a deprivation of a constitutionally protected right will be redressed under section 1983.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX NO. 1

TRIAL EXCERPT

THE COURT: There was about five feet between the fence and the car and you and the Policeman were between there and you say he pushed you back on the fence and then he pushed you back on the car to try to put handcuffs on you?

A. Yes. He had put one handcuff on me.

THE COURT: He pushed you up against the car and tried to put the handcuffs on?

A. When he pushed me, threw me up against the car, that is when he was trying to put my handcuffs on and I was telling him it was hurting me, when I was going like this and that is when he got me and pushed me against the trunk on the car, Carlos' car and that is how the rest of the blood was there where he handcuffed me.

1-176 to 1-177